[redacted]

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: JUN 13 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Protected Status under § 244 of the Immigration and Nationality Act, 8 U.S.C. 1254a

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the matter will be remanded to her for further action.

The applicant is a native and citizen of Honduras who was present in the United States without a lawful admission or parole in August 1991 and appears to have resided in the United States since that date. The director denied the application for Temporary Protected Status (TPS) under § 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1254a, because the applicant presented himself in August 1991 as a citizen of El Salvador. The director refers to another Service file, [redacted], which is not available for review. The record contains ample documentation to show that the applicant is a citizen of Honduras and eligible to apply for the benefit sought.

On appeal, counsel states that the applicant's misrepresentation was not material to his case. The applicant indicates in his supporting statement that he had been told that citizens of El Salvador were being allowed to stay in the United States and he did not want be sent back to Honduras as he came to the United States to look for work. He states that after he was apprehended and fingerprinted, he told the Service officer that he was from El Salvador.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. 244, provide that an applicant who is a national of Honduras is eligible for temporary protected status only if such alien establishes that he or she:

a. Is a national of a state designated under § 244(b) of the Act;

b. Has been continuously physically present in the United States since January 5, 1999;

c. Has continuously resided in the United States since December 30, 1998;

d. Is admissible as an immigrant;

e. Is not ineligible under 8 C.F.R. 240.4; and

f. Pursuant to § 303(b)(1) of IMMACT 90, has timely registered for such status between January 5, 1999 and July 5, 2000.

The term continuously physically present, as used in 8 C.F.R. 244.1, means actual physical presence in the United States since January 5, 1999. Any departure, not authorized by the Service, including any brief, casual, and innocent departure, shall be deemed to break an alien's continuous physical presence.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by the Service. 8 C.F.R. 244.9(a). The sufficiency of all evidence will be

judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. 244.9(b).

Section 212(a), 8 U.S.C. 1182(a)(6)(C)(i), CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
>
> (C) MISREPRESENTATION.-
>
> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The director failed to affirmatively determine in her decision whether the applicant was inadmissible under § 212(a)(6)(C)(i) of the Act for having attempted to procure admission into the United States by fraud or willful misrepresentation. However, if that determination is made, there is a waiver available under § 244(c)(2)(A) of the Act and the applicant should be afforded the opportunity to apply for that waiver.

The Associate Commissioner cannot speculate on what occurred in August 1991 as that information is contained in another Service file and is not available for review. Nevertheless, the applicant has now manifested himself as a citizen of Honduras and he appears to be prima facie eligible to apply for the benefit sought. If it is determined that he is inadmissible under § 212(a)(6)(C)(i) of the Act, he should be afforded the opportunity to file a waiver application on Form I-601 to seek a waiver of that ground of inadmissibility for humanitarian purposes.

The director's decision will be withdrawn and the matter will be remanded to her for further action and the entry of a new decision which, if adverse to the applicant, is to be certified to the Associate Commissioner for review.

ORDER: The director's decision is withdrawn and the matter is remanded to her for further action and the entry of a new decision which, if adverse to the applicant, is to be certified to the Associate Commissioner for review.